

**THE UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.**

In the Matter of

**CERTAIN WIRELESS CONSUMER
ELECTRONICS DEVICES AND
COMPONENTS THEREOF**

Investigation No. 337-TA-853

**RESPONDENTS' CONTINGENT PETITION FOR REVIEW
OF INITIAL DETERMINATION ON DOMESTIC INDUSTRY**

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TABLE OF ABBREVIATIONS

'336 patent	U.S. Patent No. 5,809,336, entitled “High Performance Microprocessor Having Variable Speed Clock”
Complainants	Complainants Phoenix Digital Solutions, Patriot Scientific Corporation and Technology Properties Limited
CIB	Complainants’ Initial Post-Hearing Brief
CRB	Complainants’ Reply Post-Hearing Brief
Respondents	Acer Inc. and Acer America Corporation (collectively, “Acer”); Amazon.com, Inc. (“Amazon”); Barnes & Noble, Inc. (“Barnes & Noble”); Garmin Ltd., Garmin International, Inc. and Garmin USA, Inc. (collectively, “Garmin”); HTC Corporation & HTC America, Inc. (collectively, “HTC”); Huawei Technologies Co., Ltd., Huawei Device Co., Ltd., Huawei Device USA Inc., and Futurewei Technologies, Inc. (collectively, “Huawei”); Kyocera Corporation & Kyocera Communications, Inc. (collectively, “Kyocera”); LG Electronics, Inc. and LG Electronics U.S.A., Inc. (collectively, “LG”); Nintendo Co., Ltd., and Nintendo of America Inc. (collectively, “Nintendo”); Novatel Wireless, Inc. (“Novatel Wireless”); Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc. (collectively, “Samsung”); and ZTE Corporation and ZTE (USA) Inc. (collectively, “ZTE”). The moving Respondents, however, do not include Acer, Amazon or Kyocera – each of whom have filed a motion to terminate the Investigation pursuant to settlement.
RIB	Respondents’ Initial Post-Hearing Brief
RRB	Respondents’ Reply Post-Hearing Brief
SIB	Staff’s Initial Post-Hearing Brief
SRB	Staff’s Reply Post-Hearing Brief
ID	Final Initial Determination

Note: Unless otherwise noted, all emphases in this brief have been added.

I. INTRODUCTION

On September 6, 2013, Administrative Law Judge E. James Gildea issued his Initial Determination (“ID”) in this Investigation, correctly concluding that there has been no violation of Section 337 by any Respondents. The ID reflects an exhaustive and thoughtful examination of the patent-in-suit, relevant technology, documentary evidence and witness testimony presented during the evidentiary hearing. After careful consideration of the private parties’ and Staff’s post-hearing briefs, the ALJ issued a well-reasoned and fully-supported ID that sets forth three separate and independent reasons why none of the Respondents’ accused products infringes any of the asserted claims of the ’336 patent. As a result, Respondents submit that review of any portion of the ID is unnecessary.

Separately, the ID also concluded that a domestic industry exists in the United States based solely upon Complainants’ licensing activities relating to a certain “MMP Portfolio” (which includes the asserted ’336 patent). Should the Commission decide to review any portion of the ID, Respondents request that the Commission also grant this contingent petition on the question of the existence of a domestic industry, which involves issues of policy central to the Commission’s recent pronouncements on licensing domestic industries.

Despite Judge Gildea’s well-reasoned analysis, the following two issues present novel legal questions and public policy considerations that would benefit from Commission review.

1. Because Complainant Technology Properties Limited (“TPL”) did not have the right to license the MMP Portfolio at the time the complaint was filed, or anytime thereafter, it cannot establish the existence of a domestic industry in this Investigation as required by Section 337; and
2. TPL’s investments relating to licensing the ’336 patent are not “substantial” within the meaning of Section 337 because, among other reasons, (a) TPL’s

licensing program relies exclusively on a revenue-driven licensing model that targets existing production, rather than the industry-creating, production-driven licensing activity that Congress intended to cover under Section 337, (b) TPL failed to allocate any alleged investments between the entire MMP Portfolio and the asserted '336 patent; and (c) TPL does not engage in any other “exploitation” of the '336 patent, such as engineering or research and development activities.

These issues, when considered in light of current Commission precedent, dictate a conclusion that TPL has failed to establish the existence of a domestic industry in this Investigation. A finding in favor of Respondents on either or both of these issues would provide additional, independent grounds to support the ID’s conclusion that Respondents have not violated Section 337. In addition, to the extent it is required to establish a domestic industry based upon licensing, TPL also failed to establish any “article protected by the patent” (technical prong of domestic industry requirement).

II. STANDARD OF REVIEW

Pursuant to 19 C.F.R. § 210.43, the Commission may review the ID’s conclusions for any of the following reasons: (i) that a finding or conclusion of material fact is clearly erroneous; (ii) that a legal conclusion is erroneous, without governing precedent, rule or law, or constitutes an abuse of discretion; or (iii) that the determination is one affecting Commission policy. 19 C.F.R. § 210.43(b)(1).

A petition for review will be granted if “it appears that an error or abuse of the type described in paragraph (b)(1) of this section is present or if the petition raises a policy matter connected with the initial determination, which the Commission thinks it necessary or appropriate to address.” 19 C.F.R. § 210.43(d)(2). Once a petition is granted, Commission review is conducted de novo. *Certain EPROM, EEPROM, Flash Memory, and Flash*

Microcontroller Semiconductor Devices, and Prods. Containing Same, Inv. No. 337-TA-395, Comm'n Notice, 2000 ITC LEXIS 318, at *8-9 (Oct. 16, 2000). The Commission “may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial determination of the administrative law judge . . . [and] may also make any findings or conclusions that in its judgment are proper based on the record in the proceeding.” 19 C.F.R. § 210.45(c).

III. DOMESTIC INDUSTRY

A. **A Domestic Industry Based On Licensing Under Section 337(a)(3)(C) Cannot Be Established Because TPL’s Rights To License The ’336 Patent Were Rescinded Before The Complaint Was Filed**

The three Complainants in this Investigation are Technology Properties Limited (“TPL”), Patriot Scientific Corporation (“PTSC”) and Phoenix Digital Solutions (“PDS”). However, Complainants made a tactical decision at the time they filed their complaint and throughout discovery to limit their domestic industry proof exclusively to TPL’s alleged licensing of the MMP Portfolio. Specifically, the complaint, upon which this Investigation was instituted, unequivocally asserted that “all substantial rights to the MMP Portfolio are held in the aggregate by Complainant TPL (along with any residual rights maintained by Complainants PTSC and PDS).” (Complaint, ¶ 5.)

This allegation proved to be false, as it is undisputed that when Complainants filed their complaint on July 24, 2012, and at all times throughout this Investigation, [REDACTED]

[REDACTED] Tr. (D.E. Leckrone) at 143:10-145:15; ID at 311 (finding “no dispute that PDS had the right to license the asserted patent at the time the Complaint was filed and throughout the Investigation.”). Without the right to license the MMP Portfolio, TPL did not, and could not, have a domestic industry in licensing the ’336 patent at the time the complaint was filed or

anytime thereafter, as required by Section 337.

The ID came to a different conclusion, however, as the ALJ determined that it was “immaterial whether it was TPL or another Complainant that had the ability to license the asserted patent at the time the Complaint was filed.” ID at 311.

The issue of whether a purely licensing-based domestic industry can be established under Section 337(a)(C)(3) by an entity that holds no rights to license the asserted patent at the time the complaint is filed, or at any time during the Investigation, presents a novel legal issue affecting Commission policy. Should the Commission grant review of any part of the ID, Respondents respectfully request that the Commission also review this issue and find that when Complainants’ domestic industry assertions are properly limited only to TPL’s licensing investments, and not those of Complainants PTSC or PDS, Commission policy precludes a domestic industry because of the rescission of TPL’s rights to license the MMP Portfolio before the complaint was filed.

1. The Domestic Industry Inquiry In This Investigation Should Be Limited To TPL’s Licensing Efforts

During the discovery phase of the Investigation, Complainants refused to produce certain discovery relating to the licensing activities of PDS and PTSC. In response to Respondents’ motion to compel, Complainants opposed the discovery by confirming that they were only relying on TPL’s investments to establish a domestic industry in this Investigation. As a result of these representations, the ALJ issued Order No. 28, which acknowledged that Complainants only intended to rely on TPL’s investments to support their domestic industry claims, and denied part of Respondents’ requested discovery on that basis. Order No. 28 at 3-4. The ALJ later issued Order No. 61, in which he denied Complainants’ motion for reconsideration of Order No. 28 and their related motion for leave to rely on PDS investments. Order No. 61 at 4-5. In

denying Complainants' motions, the ALJ rejected Complainants' attempt to unfairly expand the scope of their domestic industry allegations, and explained that Complainants "made a tactical decision before this Investigation began to rely exclusively on TPL's investments to support their domestic industry claims." Order 61 at 5. As a result of these pre-trial orders, the ALJ did not permit TPL to rely on licensing investments of PTSC or PDS, and the record is therefore limited to TPL's investments.¹ Permitting Complainants to rely on PTSC or PDS activities or rights to establish a domestic industry at this stage, after Complainants' numerous representations unfairly prejudices Respondents.

This Investigation is distinguishable from other investigations where Complainants clearly articulate from the outset that they are relying on the domestic activities of multiple Complainants. Here, Complainants explicitly stated that they were relying solely on TPL and expressly disclaimed reliance on PDS and PTSC investments to establish a domestic industry. Complainants should be bound by their representations, and Respondents should be entitled to rely on these representations throughout the Investigation. Because the evidentiary record was necessarily limited by Complainants' "tactical decision" to limit their domestic industry allegations solely to TPL, Complainants should not be allowed, as a matter of Commission policy, to rely upon the licensing rights, activities or investments of others, including other Complainants such as PDS.

¹ In the ID, the ALJ found that with respect to TPL's lack of any legal right to license the '336 patent, "Order Nos. 28 and 61 do not preclude Complainants from showing that TPL's investments established a domestic industry and that the domestic industry was ongoing at the time the Complaint was filed based on the continuing licensing activities of another Complainant." ID at 312.

2. TPL Did Not Have Any Right To License The '336 Patent When The Complaint Was Filed, Or At Any Time Thereafter

Section 337 provides that no violation may be found unless “an industry in the United States, relating to the articles protected by the patent, copyright, trademark, mask work, or design concerned, exists or is in the process of being established.” 19 U.S.C. §1337(a)(2). It is long established—and was recently affirmed by the Federal Circuit—that the existence of a domestic industry is determined as of the date the complaint is filed. *Bally/Midway Mfg. v. Int'l Trade Comm'n*, 714 F.2d 117, 1120 (Fed. Cir. 1983) (holding that the date of filing of a complaint with the Commission was the appropriate date at which to analyze the existence of a domestic industry); *see also Motiva, LLC v. Int'l Trade Comm'n*, —F.3d—, Dkt. No. 2012-1252, slip op. 11 n.6 (Fed. Cir. May 13, 2013) (affirming “Commission’s use of the date of the filing of the complaint as the relevant date at which to determine if the domestic industry requirement of Section 337 was satisfied” in *Certain Video Game Sys. and Controllers*, Inv. No. 337-TA-743).

This rule precludes Complainants from improperly arguing that TPL’s claimed domestic industry in licensing the ’336 patent existed or was in the process of being established on the day the complaint was filed. TPL’s alleged licensing based domestic industry ceased to exist three weeks earlier when TPL gave up the right to license the patent.

To allow Complainants to rely on a domestic industry that did not exist when the complaint was filed is contradictory to well-established Commission precedent and would improperly “provide redress to complainants who were not timely in seeking relief” or who “ceased to exploit their patent rights by the time of the filing of the complaint.” *Certain Rotary Wheel Printing Sys.*, Inv. No. 337-TA-185, Comm’n Op. at 42 (Aug. 12, 1985). To hold otherwise would be contrary to the plain meaning of the statute and would reward Complainants for their repeated misrepresentations that TPL had the exclusive right to license the ’336 patent

when Complainants filed the complaint. Contrary to Complainants' statements in the complaint and the verification filed under oath, [REDACTED]

[REDACTED] Tr. (D.E. Leckrone)

144:17-145:4.

As a matter of Commission policy, a domestic industry cannot exist given the misrepresentation of such a fundamental fact, namely, who has the right to license the patent upon which the domestic industry claim is based. Accordingly, when Complainants' domestic industry allegations are properly limited solely to TPL, as they should be, there can be no domestic industry in this Investigation.

B. TPL's Investments Relating To The '336 Patent Are Not "Substantial" Within The Meaning Of Section 337

A complainant seeking to satisfy the domestic industry requirement of Section 337 based on patent licensing must establish that there is a nexus between the alleged investment and the asserted patent, that the investment relates to licensing, and that the investment occurred in the United States. 19 U.S.C. § 1337(a)(3)(C); *see, e.g., Certain Multimedia Display and Navigation Devices and Sys., Components Thereof, and Prod. Containing Same*, Inv. No. 337-TA-694, Comm'n Op. at 7-8 (Aug. 8, 2011) ("*Navigation Devices*"). "Only after determining the extent to which the complainant's investments fall within these statutory parameters can [the Commission] evaluate whether complainant's qualifying investments are 'substantial,' as required by [Section 337(a)(3)(C)]." *Id.* at 8, 15.

² Notably, even when they had the opportunity to set the ITC record straight, Complainants did not do so. For example, Complainants twice filed amended complaints but each time failed to correct the false statement that TPL held "all substantial rights" in the '336 patent. Each amended complaint repeated without change this false claim about TPL's alleged licensing rights. Oct. 2, 2012 First Am. Compl. of Technology Properties Limited LLC Under Section 337 of the Tariff Act of 1930, As Amended, at ¶5; Nov. 13, 2012 Second Am. Compl. of Technology Properties Limited LLC Under Section 337 of the Tariff Act of 1930, As Amended, at ¶5.

In this regard, after rendering his findings regarding the nature and eligibility of TPL's investments, the ALJ weighed various factors to determine whether such investments were substantial. The ID concludes that certain factors weigh in favor of finding TPL's investments substantial, while others weigh against a finding of substantiality. ID at 316. Ultimately the ALJ concluded that "on balance...Complainants' domestic investments in licensing the asserted patent are substantial." ID at 317.

The ALJ's conclusion that Complainants' investments are substantial raises significant policy issues that are appropriate for Commission review.

1. Factors Determining Whether An Investment Is "Substantial"

The Commission recently set forth the relevant factors for evaluating whether a complainant's investment in licensing is substantial. *See Navigation Devices* at 15-16, 23-25. While the Commission has recognized that its approach to determining whether the claimed domestic industry investment is substantial is "flexible," Complainants still must make some showing of the substantiality of TPL's investments to satisfy the domestic industry requirement. *Id.* Complainants have failed to meet this burden with respect to certain benchmarks established by the Commission to measure substantiality. These benchmarks include whether the claimed investment is "substantial in the context of the complainant's business, the relevant industry and market realities." *Certain Kinesiotherapy Devices and Components Thereof*, Inv. 337-TA-823, Comm'n Not. at 2 (March 25, 2013); *see also Navigation Devices* at 15. Other factors considered by the Commission include: (1) the existence of other types of "exploitation" of the asserted patent such as research, development, or engineering, (2) the existence of license-related ancillary activities such as ensuring compliance with license agreements and providing training or technical support to its licensees, (3) whether complainant's licensing activities are continuing, and (4) whether complainant's licensing activities are those that are referenced

favorably in the legislative history of section 337(a)(3)(C). *Navigation Devices* at 15.

The ALJ considered the factors discussed below in subsections (a) through (c) and correctly found them to weigh against a finding that TPL’s investments were “substantial.” ID at 317. However, the ALJ concluded that on balance, after considering other factors, TPL’s investments were substantial. The Commission should review the findings on these factors as a matter of policy to determine whether it would ascribe different weight to these factors. The weight of the evidence on these factors provides sufficient grounds to modify the ID’s conclusions on domestic industry.

Should the Commission elect to review the ID, Respondents submit that taken as a whole, TPL’s investments in its purely revenue-driven licensing program are not substantial as a matter of Commission policy.

a. TPL’s Licensing Program Is Revenue-Driven And Targets Existing Production

TPL’s alleged licensing activities do not comport with those that are favorably referenced in the legislative history of Section 337. The evidence establishes that TPL’s licensing activities are purely revenue-driven and focus on identifying existing products that allegedly infringe the patents within the MMP Portfolio and seek licenses from the entities that already produce and sell those products. Tr. (M. Leckrone) 1542:8-1543:21; Tr. (Hannah) 1739:12-1740:7.

This is not the type of licensing program that Congress sought to protect when it amended Section 337. *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, § 1342, 102 Stat. 1107, 1213; *Mezzalingua Assoc. Inc. v. Int’l Trade Comm’n*, 660 F.3d 1322, 1327 (Fed. Cir. 2011); S. Rep. No. 100-71, at 129 (1987); H.R. Rep. No. 100-40, at 157 (1987) (“The definition . . . encompasses universities and other intellectual property owners who engage in extensive licensing of their rights to manufacturers.”); *see also*, 132 Cong. R. H1782

(Apr. 10, 1986) (“Congress contemplated that the requirement would cover small companies, such as biotech startups, that license their patents in order to generate sufficient capital to manufacture a product in the future.”).

Further, the Commission has stated that it “understand[s] the word ‘licensing’ in section 337(a)(3)(C) to suggest the ‘exploitation’ of a patent in a manner similar to ‘engineering’ and ‘research and development.’ [Those types of] [i]nvestments . . . represent efforts to facilitate and/or hasten the practical application of the invention by, for example, bringing it to market.” *Certain Coaxial Cable Connectors & Components Thereof & Prods. Containing Same*, Inv. No. 337-TA-650, Comm’n Op. at 47 (April 14, 2010). In contrast, rather than spur new production, TPL’s alleged activities stifle existing production and sales. TPL’s alleged licensing program is not directed toward “encourag[ing] adoption and development of articles that incorporate[.]” the patented technology, as the Federal Circuit recently recognized is a relevant factor when evaluating the economic prong of the domestic industry requirement. *See Motiva, LLC*, — F.3d—, Dkt. No. 2012-1252, slip op. at 9. To the contrary, the exclusive focus of TPL’s licensing program is to extract licenses from companies already selling products so that companies have, in TPL’s words, the “freedom to operate.” JX-354C at ¶3; Tr. (Vander Veen) 1843:8-15; Tr. (M. Leckrone) 1542:8-1543:21; ID at 309.

Although the ALJ identified TPL’s revenue-driven licensing model as a factor weighing against a finding of substantiality (ID at 317), Commission policy should give this factor greater weight in the context of the substantiality analysis – particularly given the paucity of documentary evidence produced by TPL to support its claimed investments. When reviewed in the context of Section 337’s legislative history and prevailing Commission and Federal Circuit authority, TPL’s revenue-focused licensing program should not be given weight to support a

determination that its alleged licensing investments are substantial.

b. TPL Does Not Engage In Any Other “Exploitation” Of The ’336 Patent

As set forth above, a purely revenue-driven licensing model that targets existing production does not constitute the type of exploitation of a patent contemplated by Section 337. However, a complainant’s investments may be deemed substantial if the complainant engages in some other activities that do exploit the patent, such as “research, development, or engineering.” *See Navigation Devices* at 15, 24.

In considering this factor, the ALJ correctly found that “Complainants do not invest in other activities to exploit the ’336 patent.” ID at 317. As a result, the ALJ determined that this fact also weighs against a conclusion that TPL’s investments were substantial. *Id.* As a matter of Commission policy, this factor should receive greater weight in the overall analysis of substantiality.

c. Complainants Failed To Allocate Any Alleged Investments Between The Entire MMP Portfolio And The Asserted ’336 Patent

Complainants’ alleged investments relate to the entire MMP Portfolio, without any apportionment for the ’336 patent. Tr. (Hannah) 1760:7-12. Complainants did not dispute this fact, and the ALJ correctly found that Complainants “made no attempt to determine the actual value of their investments in the asserted patent, instead relying on the alleged total investment in the MMP Portfolio.” ID at 317. While the ALJ noted that the Commission does not require “an exact allocation of investments to the asserted patents,” he rightly concluded that Complainants’ failure to set forth any allocation weighs against a finding that Complainants’ investments are substantial. *Id.*

As a matter of policy, Complainants’ failure to allocate should strongly weigh against a

finding of domestic industry.

Indeed, Complainants' failure to allocate any investments to the asserted patent is particularly important because expenses for the MMP Portfolio relate to both U.S. and foreign patents in the portfolio, but there is no way to identify what portion of the claimed investment relates to foreign licenses and patents. Tr. (Hannah) 1759:2-25. *See Certain Integrated Circuits, Chipsets, and Prod. Containing Same Including Televisions*, Inv. No. 337-TA-786, Comm'n Op. at 32 (Oct. 10, 2012) ("we cannot even determine from the evidence Freescale presents what portion of its licensing investments concerns domestic versus foreign licenses"). Moreover, Complainants' failure to demonstrate how their investments in litigation and in prosecution (both before and after their separate identification post-2008) are related to licensing similarly dictates that the unidentified portions related thereto cannot be credited toward a licensing-based domestic industry. *See Coaxial Cable*, Inv. No. 337-TA-650, Comm'n Op. at 43-44, 50-51; *Certain Video Game Sys. & Controllers*, Inv. No. 337-TA-743, Comm'n Op. at 8 (Apr. 14, 2011).

The ALJ correctly found each of the three factors discussed above in Respondents' favor, and correctly determined that each of these factors weighs against a conclusion that Complainants' investments are substantial. However, the ALJ concluded that despite these factors, even in the aggregate, Complainants' investments are substantial. Respondents submit that, as a matter of Commission policy as Congress envisioned when amending Section 337, these factors weigh against a finding of substantiality.

d. Complainants' Investments Are Not Substantial In Light Of Other Factors Considered By The ALJ

The ALJ found that several other factors weigh in favor of finding that Complainants' investments related to the MMP Portfolio are substantial, including the total amount invested in

the MMP Portfolio (approximately [REDACTED]), the number of patents in that portfolio (approximately 15), the relative importance of the '336 patent in licensing negotiations, the number of executed licenses (approximately [REDACTED]) and the number of companies that Complainants have engaged in licensing negotiations. ID at 308, 310, 316; Tr. (M. Leckrone) 1534:22-1535:4, 1538:8-13. As part of the overall analysis, the ALJ also considered “to a lesser extent,” the fact that Complainants engaged in some ancillary activities (*e.g.*, license compliance), that Complainants’ licensing activities are ongoing and the revenue generated from MMP Portfolio licenses. ID at 316-317.

The ALJ concluded that these additional factors, when balanced against the factors discussed above in subsections (a) through (c), support the ultimate conclusion that Complainants’ investments are substantial. ID at 317. Respondents respectfully disagree with this ultimate conclusion for the reasons set forth above, and because certain of the supporting factors should be qualified before any balancing occurs.

First, while the number of licenses to the MMP Portfolio is relatively large, the evidence established that some of Complainants’ license agreements included licenses to other patent portfolios, in addition to the MMP Portfolio. In this regard, the MMP Portfolio was one of at least [REDACTED] portfolios that TPL owned or managed at one time. Tr. (D.M. Leckrone) 1575:8-10. Moreover, Mr. Daniel M. Leckrone testified that in 2011-12, it was another of those portfolios, the CORE Flash portfolio, that occupied the majority of the alleged licensing activity. Tr. (D.M. Leckrone) 1588:9-24. Complainants, who bear the burden of proof on domestic industry, failed to offer the actual licenses as evidence. As a result, there is no record from which to determine the percentage of the approximately [REDACTED] licenses that also include other patent portfolios. By way of example, Complainants’ CFO, Dwayne Hannah, testified about a license agreement with

Apple, which was not offered as evidence by Complainants, that included a total of four different patent portfolios, including the MMP Portfolio. Tr. (Hannah) 1797:22-1798:7. Thus, the total number of licenses involving the MMP Portfolio, without the additional information about other portfolios included, is not a meaningful indicator of whether Complainants' investments relating to the MMP Portfolio are substantial and this consideration should be given less weight.

Second, Complainants offered testimonial evidence that they conducted some compliance related activities which the ALJ credited "to a lesser extent" as ancillary activities supporting substantiality. These activities included monitoring the current licensees' M&A (merger and acquisition) activities to determine if a "licensee will need additional coverage or different coverage," and monitoring licensees' activities for any "spinout or transfer of divisions or businesses" because the transferee may need "additional and sometimes different rights." Tr. (D.M. Leckrone) 1566:1-19. Yet neither of these post-licensing activities is the type of ancillary activity that the Commission has held supports a finding of substantiality. *See Navigation Devices* at 15-16, 24, n. 19. Rather than providing design assistance or manufacturing support to their licensees to promote the exploitation of the patent, all of Complainants' ancillary, post-license activities are directed to obtaining additional revenue. Tr. (D.M. Leckrone) 1565:23-1566:22. Accordingly, any such activities should be given minimal weight in the overall analysis of substantiality.

When all of the relevant factors are considered and balanced in accordance with the requirements of Section 337 as envisioned by Congress and Commission precedent, TPL's investments in the '336 patent as part of a purely revenue-driving portfolio licensing program are not "substantial" within the meaning of Section 337(a)(3)(C). The Commission therefore should modify the conclusion reached in the ID and determine that Complainants failed to establish the

existence of a domestic industry in this Investigation.

C. A Domestic Industry Based On Licensing Under Section 337(a)(3)(C) Cannot Be Established Because TPL Failed To Demonstrate That Its Domestic Industry Activities Relate To “Articles Protected By The Patent”

Respondents submit, for purposes of preserving the issue for appeal, that a complainant, such as TPL, asserting a domestic industry based on licensing activity should be required to comply with the plain language of the statute and show that its domestic industry activities “relat[e] to . . . articles protected by the patent” asserted in the investigation (*i.e.*, technical prong requirement of domestic industry). *See* 19 U.S.C. § 1337(a)(2). The ID does not address any facts as to whether TPL showed “articles protected by the patent” and, instead, holds that “where a complainant is relying on licensing activities, the domestic industry determination does not require a separate technical prong analysis and the complainant need not show that it or one of its licensees practices the patents-in-suit.” ID at 196 (relying on *Certain Semiconductor Chips with Minimized Chip Package Size and Products Containing Same*, Inv. No. 337-TA-605, Initial Determination at 112 (Feb. 9, 2009)). Indeed, TPL presented no facts relating to licensing domestic industry activities to “articles protected by the patent” and, instead, merely took the position that no showing of technical prong was required because it was relying on licensing for its asserted domestic industry. *See* CIB at 180 (asserting that, “When relying on licensing to show a domestic industry, a complainant does not have to establish the technical prong; the economic prong is sufficient to establish a domestic industry”).

Not requiring licensing complainants to show their domestic industry activities “relat[e] to . . . articles protected by the patent” ignores the plain wording of 19 U.S.C. § 1337(a)(2) and not requiring licensing complainants to show their domestic industry is “with respect to. . . articles protected by the patent” ignores the plain wording of 19 U.S.C. § 1337(a)(3). Although the Federal Circuit took up this issue in *InterDigital Commc’ns, LLC v. Int’l Trade Comm’n*, 690

F.3d 1318, 1329 (Fed. Cir. 2012), Respondent Nokia has petitioned the Supreme Court for review of that decision. Moreover, the Commission is currently seeking comment on this issue in Inv. No. 337-TA-800. *See* 78 Fed. Reg. 55294, 55295 (Sept. 10, 2013) (requesting comment on: “whether establishing a domestic industry based on licensing under 19 U.S.C. 1337 (a)(3)(C) requires proof of ‘articles protected by the patent’ (*i.e.*, a technical prong)”).

IV. CONCLUSION

ALJ Gildea’s ID correctly concludes that there has been no violation of Section 337 by any Respondents based on the finding that Respondents do not infringe any claim of the ’336 patent. Respondents submit that review of any portion of the ID is therefore unnecessary. However, if the Commission decides to review any portion of the ID, Respondents request that the Commission also review the domestic industry issues in this contingent petition and determine that Complainants have not satisfied the domestic industry requirement for this Investigation.

Alternatively, in lieu of specifically finding that Complainants have not satisfied the domestic industry requirement, Respondents request that the Commission only review the domestic industry portion of the ID, but take no position on the issue. *See, e.g., Beloit Corp. v. Valmet Oy*, 742 F.2d 1421 (Fed. Cir. 1984) (allowing notice for review on an issue and then no decision on the issue by the agency); 19 C.F.R. § 210.45(c) (allowing Commission to take no position on specific issues under review).

Dated: September 23, 2013

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I, Matthew Salcedo, hereby certify that on October 18, 2013, a copy of the **PUBLIC VERSION OF RESPONDENTS' CONTINGENT PETITION FOR REVIEW OF INITIAL DETERMINATION ON DOMESTIC INDUSTRY** was served on the following as indicated:

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